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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

THE ROMANIAN ORTHODOX MISSIONARY EPISCOPATE OF AMERICA, THROUGH HIS GRACE BISHOP ANDREI MOLDOVAN,

Petitioner,

VS.

IOAN TRUTZA, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioner, Andrei Moldovan, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit, rendered in this cause on May 29, 1953.

OPINION BELOW.

The opinion of the Court of Appeals (R. 107-117) has not yet been reported. The opinion, the findings of fact

and conclusions of law, and the final order of the district court (RD. 102a-105a; RP. 34a-38a; 39a-42a) are not reported.[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1953 (R. 107-108). On July 3, 1953, an order was entered amending the opinion (R. 117-118). A motion to extend time to file Petition for Rehearing was denied August 10, 1953 (R. 120). On August 24, 1953, by order of Mr. Justice Clark, petitioner's time to file a petition for a writ of certiorari was extended to and including October 20, 1953. The statutory provision believed to sustain the jurisdiction of this Court is section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Whether the Patriarch and Holy Synod of the Romanian Orthodox Church, or a Congress composed of clergymen and laymen of the American Churches, validly selects the ruling hierarch for the American Churches.

2. Whether Andrei Moldovan has power and authority to obtain possession and control of the property in question, and to exercise the privileges and prerogatives of bishop of the Episcopate by virtue of his selection and consecration as bishop of North and South America by the Supreme Church Authority of the Romanian Orthodox Church, to wit: the Patriarch of Bucharest and the Holy Synod.

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[1] References to the proceedings in the lower court are designated as "R." References to the appendix of appellants' brief in the lower court are designated "RP"; to the appendix of appellee's brief "RD." References to the stenographic transcript of proceedings in the trial court are designated as "TR."

STATEMENT.

This is an action brought in the United States District Court for the Northern District of Ohio for injunction and equitable relief by petitioner, Andrei Moldovan, in behalf of the Romanian Orthodox Missionary Episcopate of America as its duly authorized representative and ruling hierarch thereof, seeking to obtain undisturbed control and possession of certain personal property and funds of the Episcopate; to restrain the respondents from using or expending said funds; and to restrain respondents from representing that they are the duly authorized representatives of the Episcopate (R. 9a-14a). The respondents filed their answer to which they attached an alleged counter-claim for interpleader and also filed a cross-claim. Petitioner filed a motion to strike the counter-claim for interpleader, and to dismiss the cross-claim, accompanied by brief and reply brief.

The district court, upon final hearing, dismissed the petitioner's amended complaint and granted a permanent injunction against the individual petitioner restraining him from representing himself as a priest or bishop of the Romanian Orthodox Missionary Episcopate of America, and from asserting any rights based upon the claim that he is the bishop of the Episcopate to use, control or occupy either directly or indirectly any of the real or personal property of the Romanian Orthodox Missionary Episcopate in America.

In the year 1929, the various Romanian Orthodox parishes in the United States and Canada organized themselves into an episcopate or diocese of the Romanian Orthodox Church by authority of and under the Canonical and Spiritual jurisdiction of the Patriarch and Holy Synod of the Mother Church in Romania, and became known as the Romanian Orthodox Missionary Episcopate of America

(RP. 30a-31a; 32a-34a) (TR. 8, 9,—129, 130). The Romanian Orthodox Church is an autocephalous member of the Eastern Orthodox Greek Catholic Church. It is a hierarchal church with a Patriarch as its head who presides over the Holy Synod composed of Bishops and Archbishops representing the various dioceses into which the Romanian Orthodox Church is divided for purposes of church organization. The Holy Synod is the Supreme Authority in the church (RP. 20a; 22a-23a; 30a). To obtain proper leadership for the Episcopate and in order to conform with the requirements of the Canon Laws of the Orthodox Church concerning the organization and government of the Diocese, the Holy Synod of the Romanian Orthodox Church was to appoint and consecrate a Bishop to head the newly organized episcopate. A committee ad interim was appointed to manage the administrative affairs of the Episcopate until a Bishop could be appointed and sent to the United States. In the year 1932, this committee had enacted a set of by-laws, of which Article VII thereof provided that the bishop should "be elected by the Church Congress of Parishes belonging to the Episcopate called thirty days in advance, and presided by a special delegate of the Holy Synod; the elected one shall receive, if he meets all the canonical requirements, the canonical investiture from His Holiness the Patriarch of the Romanian Orthodox Church, in accordance with the traditions of the Orthodox Church." This committee administered the affairs of the Episcopate until 1935 when the Holy Synod in Romania appointed and sent to America as first Bishop of the Episcopate, His Grace Policarp Morusca (RP. 32a) (TR. 281, 282). In organizing the diocese to conform with canonical requirements, the 1932 By-Laws were compiled in their final form with certain principal changes thereto deleting the aforementioned

Article VII and providing for the election and consecration of the bishop by the Holy Synod and investiture by the Patriarch (RP. 17a), and the further requirement that any change or modification of the By-Laws must be approved by the Holy Synod to be valid (RP. 23a) (TR. 249, 250). These were submitted to and approved and ratified by member parishes of the Episcopate as represented by delegates in the Church Congress of 1936 which was presided by the newly sent Bishop (TR. 93, 95, 96). The Holy Synod in October of 1936 approved the by-laws of the Episcopate as ratified in their final form by the Church Congress of 1936 (RP. 30a) (TR. 132) (RP. 20a, 22a, 23a).

In 1938, the Episcopate purchased a large parcel of real estate in the township of Grass Lake, County of Jackson, State of Michigan (RP. 32a), title to which was taken in the name of the "Romanian Orthodox Missionary Episcopate, a non-profit Michigan corporation and His Grace Policarp Morusca, not in his proper person but as reigning prelate of the Romanian Orthodox Churches in America under the authority vested in him by the Holy Synod in Romania, or his successors as such in office, jointly as hereinafter set forth * * *." The deed to the real estate contains the provision that "* * * it is intended that the corporation shall act only as trustees for and in behalf of the Romanian populace of America and that neither they as such trustees, the Episcopate Council, nor the Church Congress shall have the right to alter the purposes or the objects contained in the original articles of incorporation of the Romanian Orthodox Missionary Episcopate, nor shall they have the right to sell, lease, assign, transfer, encumber nor do any act affecting the proprietary rights of the above described premises without the express consent and authorization of the Holy Synod of Romania

through its lawfully constituted represenative now being His Grace Policarp P. Morusca, or his successor, as such in office * * *" and further that "* * * It is likewise agreed that the restrictions as to the corporate grantee in like manner applies to the Holy Synod grantees and it is the intent that jointly the grantees may do all necessary acts that any person holding title in fee may or could do, but that neither have any possession or ownership rights without the consent of the other * * *" (RP. 32a-33a).

The real estate known as "Vatra Romaneasca" was purchased with funds supplied by the Church in Romania, and was consecrated as the SEE of the diocese and the official residence, headquarters, and place of worship of the Bishop. The predecessor bishop, Policarp Morusca, had so occupied it, and the petitioner, Andrei Moldovan, was so occupying it since his appointment as the accredited bishop of the diocese until he was dispossessed by the order of the District Court.

The Episcopate was incorporated in the State of Michigan in 1943. The articles of incorporation provide, among other things, that the member parishes which constitute the Episcopate shall worship and conduct themselves in accordance with the rules, discipline, and customs as established from time to time by the Romanian Orthodox Church and the Holy Synod thereof, its Supreme Canonical Authority; and that the Episcopate was to govern itself in accordance with the severally enacted by-laws ratified in their final form in 1936 and approved by the Holy Synod in the same year (RP. 30a, TR. 501-502).

Bishop Policarp Morusca had not resided in the United States since 1939 when he returned to Romania, and during his absence appointed Father Mihaltian to act in his place over the affairs of the Episcopate in America (TR.

138). This period, and especially the years since World War II, found the Episcopate in a state of spiritual anarchy due to the absence of a ruling hierarch here in America, and to a world in tension which induced disturbances in the American diocese. In 1947, the Vicar of the Episcopate, Father Mihaltian, received a communication that the bishop for the American Romanians was named in the person of a Dr. A. Nica, and that the Episcopate should prepare to receive him as such (RD. 10a). In the light of the political temper of the times, this created a feeling of uneasiness among members of the Episcopate Council (RD. 9a, 10a, 11a). Pursuant to a resolution of the Council, Andrei Moldovan, as secretary, protested the sending of a Bishop directly from Romania—an action which was thought would reflect on their loyalty as American citizens (RD. 23a, 24a, 25a, 26a). The Supreme Church Authority acquiesced in the request of its American adherents and did not send a Romanian citizen as Bishop. This was followed by many attempts within the Episcopate to effect and restore proper government and discipline of the Episcopate according to the laws and usage of the Romanian Orthodox Church. Seeing the futility thereof, a group of clergy and lay members of the Episcopate met in a conference in May, 1950 (TR. 470), and determined that the solution to the problems of the Episcopate would be the selection of an American citizen as bishop and ruling hierarch of the Episcopate. In accordance therewith, they directed their efforts to the Supreme Church Authority in Romania. Upon the recommendation of this group (RD. 80a, 100a), the Patriarch and Holy Synod in Romania selected Father Arch Priest Andrei Moldovan, an American Citizen, as bishop and ruling hierarch of the American diocese (RD. 38a, 39a-62a, 63a), and pursuant thereto in

November of 1950, he was consecrated by the Holy Synod and invested by the Patriarch of the Romanian Orthodox Church (RD. 79a, 80a, 81a,—91a, 92a, 93a) (TR. 307, 308-436, 437, 438-559).

The by-laws which were enacted and ratified in their final form by the Church Congress of 1936 and approved by the Holy Synod in the same year were in full force and effect during 1950 when Andrei Moldovan was appointed bishop for the American Churches. There have been discussions and even some resolutions by the Council and Church Congress relative to changing or modifying the by-laws, but none of these were ever submitted to or approved by the Holy Synod (RP. 23a) (TR. 59, 94, 250).

During the pendency of the instant case in the District Court, the individual respondents and some of their followers held a church congress in the name of the Episcopate in July of 1951, and resolved to and did sever all relationship and connection with the Mother Church and Supreme Church Authority in Romania, that is, administratively, spiritually and canonically, and further reserved the right to conduct their affairs without any authority of the Patriarch and Holy Synod (R. 114, 115, 116) (TR. 27, 28, 723, 724, 725). They further elected respondent, Viorel D. Trifa, as bishop and ruling hierarch of the Romanian Orthodox Churches in America, and pursuant thereto he was consecrated on April 26-27, 1952, outside of the Romanian Orthodox Church. The particular consecration proceedings were temporarily enjoined by the United States District Court in Philadelphia, but the respondents proceeded in violation thereof; and consequently, they were cited in Criminal Contempt on April 30, 1952. The hearing on said citation has been continued pending the outcome of the appeal in the instant case.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that petitioner is not entitled to the relief sought in the amended complaint.

2. In holding that petitioner be enjoined from acting as a priest or bishop of the religious body in question.

3. In holding that the instant case involves a controversy between the American and Canadian church group and the Communistic government of Romania working through the hierarchy.

4. In holding that the Romanian Orthodox Missionary Episcopate of America had achieved a degree of autonomy sufficient to permit it to elect its own bishop.

5. In holding that the defendants were entitled to revoke the 1936 by-laws and deny the authority of the Holy Synod due to a discovery made in 1947, that it was dealing not with the Holy Synod and the Patriarch, but with the Communistic government of Romania which was dictating the appointment of its bishop in the United States of America and Canada.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals strikes down the fundamental concept of separation of church and state, and, if not reversed, constitutes an unwarranted interference into the realm of religious freedom.

The decision holds that a dissident or schismatic group of Romanian Orthodox individuals and parishes which refuses to recognize the primacy of the Patriarch and authority of the Holy Synod of the Romanian Orthodox

Church is entitled to possess, occupy and control the trust properties acquired for the worship of God under the custom and discipline of the Romanian Orthodox Church. It holds that a civil court may decree to the independent or non-conformist group of respondents possession and control of the "Vatra" hostile to the authority and action of the Mother Church, and contrary to the restrictions and reservations of the deed to said property. It holds that parishes of a hierarchal church have the right and power to declare their independence or autonomy in violation of the laws, usages and customs of the church and without the approval of the Supreme Church Authority. It undertook to transfer control of the American Churches of the Romanian Orthodox Religion from the central governing hierarchy of the Romanian Orthodox Church, the Patriarch and Holy Synod, to the governing authorities of the Romanian Orthodox Missionary Episcopate of America, a church organization limited to the diocese of North and South America. The decision, therefore, is an unlawful intrusion into the internal affairs of a religious body, contrary to the first principles of American government, violative of the First Amendment's guarantee of freedom of religions from such governmental interference, and in conflict with the applicable and controlling decisions of this Court as set forth in *Watson v. Jones,* 13 Wall. 679, and *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U. S. 94, and fails moreover to give proper effect to decisions of this Court governing the scope of governmental interference into an area safeguarded by the Constitution.

The extent to which the decision of the lower court invades and destroys religious liberty can more readily be determined by examining the nature and status of the Romanian Orthodox Church. The Romanian Orthodox

Church is a hierarchal church. It is not an aggregate or collection of separate parishes and dioceses which are free to federate or separate at will. An orthodox church is an indivisible whole. It is a unity and no parish or diocese may of its own will leave the Church, or what is even less tolerable, consider itself a part of the church, and live "autonomously" or be "self-governing" without breaking the unity, the indivisibility of the whole. There is only one Romanian Orthodox Church (RP. 17a). 76 *C. J. S.*, Religious Societies 789. Canon law does not permit secession or schism in the church and there is an absolute bar to such conduct (RP. 17a-23a). Those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing," cut themselves off from the church and all rights to its property (*Watson v. Jones*, 13 Wall. 679, 734). The very essence of the Episcopate as a denomination of the Romanian Orthodox religion compels conformity with the canon laws, discipline and custom of the Romanian Orthodox Church. After the first bishop was enthroned in 1935, as the head of the Episcopate, he proceeded to organize the diocese to conform with canonical requirements. The by-laws enacted in 1932 were changed to provide exclusive authority in the Holy Synod in the election of the bishop. Under Romanian Church law, which remains unaffected by any changes in temporal power, the bishop of the American diocese (Episcopate) is not elected by local churches or clergy (RP. 17a), he is appointed or elected only by the Supreme Church Authority of the Church at large; namely, the Holy Synod and its Patriarch. In point of fact, the first and only other bishop who served here was elected or appointed by the Patriarch and Holy Synod, and was answerable not to the local churches or clergy, but to the Supreme Church Authority (TR. 281-282).

The Romanian Orthodox Church is an integral, though autocephalous, part of the Eastern Orthodox Greek Catholic Church. The traditional position of the church is that it is apostolic in origin and descent, that this apostolic succession is preserved through the institution of its Ecclesiastical Hierarchy in an unbroken succession from Christ and His Disciples, that its bishops have been consecrated by those duly qualified and duly authorized by Higher Authority to perform this Sacrament, and that there must be no defect anywhere in the line of descent for the transmission of Grace (RP. 15a, 16a, 17a).

The selection and consecration of a bishop is an ecclesiastical matter which lies exclusively within the domain of high prelates of the Church. This controversy concerning the right to possess and control the properties in question is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Romanian Orthodox Church to appoint the ruling hierarch of the diocese of America. There can be no doubt about the power of the Supreme Church Authority of the Romanian Orthodox Church to appoint the ruling hierarch of the diocese of America. This was recognized by the insertion of Article 6 (RP. 21a) in the by-laws of the Episcopate as enacted and approved in their final form of the Church Congress of 1936 (TR. 93, 98, 96-131, 132); the provisions in the deed to the real estate "Vatra" in Grass Lake (RP. 32a); and by the Articles of Incorporation (RP. 30a). There is no evidence, whatsoever, in the record to support the statement that the Holy Synod recognized the right of the Episcopate to elect its bishop. Admittedly, the by-laws enacted in 1932 provided that the bishop should "be elected by the Church Congress of Parishes belonging to the Episcopate called 30 days in advance, and presided by a special delegate of the Holy Synod; the elected one—

shall receive, if he meets all the canonical requirements, the canonical investiture from His Holiness the Patriarch of the Romanian Orthodox Church in accordance with the traditions of the Orthodox Church." However, the court below was in error in holding that the right of the Episcopate to elect its own bishop was recognized by the Holy Synod, since the foregoing provision acknowledges the paramount jurisdiction of the Supreme Church Authority of the Romanian Orthodox Church to appoint the ruling hierarch for the American diocese. Furthermore, the foregoing provision was never approved by the Holy Synod and thus never became valid or in force. This is clearly established by the fact that Bishop Morusca was not elected by the Church Congress of the Episcopate before being consecrated and sent here as bishop in 1935 (TR. 281, 282) (RD. 103a-105a). These 1932 by-laws were approved by the Holy Synod only after the enthronement of Bishop Morusca as first bishop of the Episcopate and after the Church Congress of 1936 adopted certain changes to them, among which there was provided for the election of the bishop by the Holy Synod and for consecration by the Patriarch in Bucharest. The approval of the Holy Synod was had in October, 1936, after the Episcopate approved the above-mentioned changes at its Church Congress in July of 1936 (RP. 30a) (R. 110). The Holy Synod, as the Supreme Church Authority, did not sanction or approve any changes whatsoever in the American diocese since its final organization in 1936. The principal, and if not the sole contention advanced by the respondents in the trial hereof was that the Episcopate in America achieved a degree of autonomy that denied the right of the Supreme Church Authority, the Patriarch and Holy Synod, to select and consecrate a bishop with authority over the diocese in America. This was induced, as contended by the respond-

ents, by a discovery in 1947 that it was dealing, not with the Holy Synod and the Patriarch, but with the Communistic government of Romania, which was dictating the appointment of a bishop in the United States of America and Canada, and that the controlling and principal party to the agreement of 1935-36 was totally different from the one with which it thought it had been dealing. That discovery, as further contended by respondents, brought about the changes in the by-laws of the Episcopate in 1947 and 1948 whereby it achieved a degree of autonomy which thereafter denied the right of the Holy Synod to select and consecrate the bishop for the American Churches. The evidence as to whether such change or any changes of the (1936) by-laws then in force were ever enacted by the Episcopate is in serious dispute. However, assuming arguendo, that the Episcopate did take steps and did modify the by-laws of 1936 as contended by respondents; nevertheless, the evidence is clear and uncontroverted that the attempted changes or modifications, if any, were never submitted to or approved by the Holy Synod as required by the Church laws (RP. 18a, 19a) (TR. 80, 81, 249, 250, 425, 520, 521). The by-laws, the Articles of Incorporation, and the provisions of the deed to the real estate, and all its actions and conduct since its founding, indicate, unequivocally, that the Episcopate in America is but a diocese of the Romanian Orthodox Church, a hierarchal church with unquestioned paramount jurisdiction in the governing body in Romania over the American Episcopate. Nothing indicates that either the Holy Synod or the succeeding Patriarchs relinquished that authority or recognized the autonomy of the American church. The District Court sustained the contention of the respondents that in 1947-48 the Episcopate in America achieved a degree of

autonomy that denied the right of the Supreme Church Authority, the Patriarch, and Holy Synod, to select and consecrate a bishop with authority over the diocese in America, and made a finding of fact and conclusion of law to that effect (RP. 35a-37a). The court below, in affirming this particular determination of the District Court, stated as follows in its opinion: "We agree with the District Court that under these circumstances the defendants were entitled to revoke their previous by-laws and to re-establish the by-laws of 1932." The Circuit Court further stated that "this conclusion is in accord with the spirit, if not the letter of the *Kedroff* case, * * *" (R. 116). Such a finding furnishes no constitutional justification for the suppression of the Patriarchal Church. The Courts below were without authority to take sides in the religious controversy as to the right of autonomy, involving the power to appoint or elect a bishop which was dependent on the laws, custom, and tradition of the Church at large. It is not within the competence of courts under our constitutional system to approve or disapprove or in any manner control the internal affairs of a religious body. The decision below constitutes an unwarranted interference in ecclesiastical matters and certainly a departure from the traditional American principle of separation of church and state. In an atmosphere where the concept of the separation of church and state is closely guarded, the choice has always been clear. Government, through its judicial branch, should not be permitted, under cover of political expediency, to transgress into the sacred area of religion safeguarded by the Constitution. This finds exemplary expression in the words of Mr. Justice Douglas in delivering the opinion of the Court in *Zorach v. Clauson*, 343 U. S. 306, at page 312, wherein he stated: "There cannot be the

slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And, so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute."

On appeal, the Court below stated that the group supporting Moldovan split off from the Episcopate and set up its schismatic body. The record indicates the contrary. The group which requested the election of Bishop Moldovan, the petitioner herein, was constituted of clergy and lay members of the Episcopate who were dissatisfied with the heresy practiced by respondent, Ioan Trutza, and as a result thereof, directed their efforts to the higher authorities within the Church, namely, the Patriarch and Holy Synod, to effect and restore proper government and discipline of the Episcopate according to the laws and usage of the Romanian Orthodox Church. Assuredly, the clergy and lay members who conferred on the problems of the Church did so in the best interest of the Church and within their rights. The fact that the Patriarch and Holy Synod approved their request and appointed Father Arch Priest Andrei Moldovan as bishop refutes the statement that they split off from the Episcopate and set up its schismatic body. The petitioner and his followers have remained in the Church, true to the discipline of the Mother Church, fully recognizing the primacy of the Patriarch and authority of the Holy Synod, as Supreme Church Authority of the Romanian Orthodox Church. Such a group having the full approval and recognition of the Supreme Church Authority certainly cannot be designated schismatics (RP. 19a).

2. The basic and all-permeating error of the Court below was its assumption that petitioner, Andrei Moldovan, has not shown himself to be a bishop elected by the Holy Synod. Such a finding has no basis in fact, is wholly arbitrary, made on the Circuit Court's own motion, in defiance of contrary evidence in the record, contrary to the findings of the District Court, and beyond the proper function of such court. The court below resolved many of the factual issues contrary to the findings of the District Court, although affirming the judgment of said court. It is not the function of a federal appellate court to retry facts on appeal. Findings of the District Court are binding on Circuit Court of Appeals except to the extent that they are clearly wrong. While Courts of Appeal, under federal rule, now act as Courts of review in all non-jury cases, in accordance with the practice formerly prevailing in equity appeals, they do not retry cases or substitute their judgment for that of the trial court on fact issues, if such court's determination thereof is not demonstrably wrong. *Hudspeth v. Esso Standard Oil Co., Thompson v. Esso Standard Oil Co.,* 170 Fed. (2d) 448. *Elm Corporation et al. v. E. M. Rosenthal Jewelry Co., et al.,* 161 F. (2d) 902. *Saco-Lowell Shops v. Reynolds,* 141 F. (2d) 587.

In the instant case, the court below went on to make findings of fact contrary to the record and contrary to the findings of the District Court, while at the same time agreeing with the District Court and affirming its judgment. The decision in this regard is based on a clear misapprehension of the record. The lower court has misread the fact finding in this connection. The trial judge in his opinion stated as follows: "The sole question for the determination of this Court therefore, is whether or not the Romanian Orthodox Missionary Episcopate or the Romanian Orthodox Episcopate of America has achieved a

degree of autonomy which is sufficient to permit it to elect its own bishop. If such autonomy rests in the episcopate here, the selection and consecration of a bishop by the Holy Synod cannot empower such bishop to obtain possession of the property in question, nor can he obtain relief such as is sought by the plaintiff here, to exercise the privileges and prerogatives of the bishop over this episcopate in the United States," and continuing therein further stated, "the evidence is overwhelming that the by-laws in effect and duly adopted at the time plaintiff (petitioner) claims to have ascended to the office required the bishop to be elected by the episcopate congress" (RD. 104a).

The District Court found that at the time petitioner ascended to the office of bishop, the by-laws required the bishop to be elected by a church congress of the Episcopate. The petitioner contended that a church congress of the Episcopate does not have authority to elect the bishop, and admitted that he was not elected by a church congress prior to his selection and consecration by the Holy Synod. The District Court found and so stated in its opinion, that, "the evidence is conclusive that the Episcopate enjoyed an autonomous existence in so far as election of its bishop is concerned" (RD. 105a); and therefore concluded that since petitioner was not elected by a church congress of the Episcopate, that he has never been elected and consecrated a bishop in conformity with the by-laws of the Romanian Orthodox Missionary Episcopate in America, and is therefore not the bishop of said Episcopate (RP. 37a), and consequently, not entitled to the relief sought. Therefore, the sole question for the trial court was one of determining who validly selects the ruling hierarch for the Episcopate in America. The District Court found that a

Congress of the Episcopate in America selects the bishop and not the Holy Synod in Romania, and therefore dismissed petitioner's Complaint. This is further evidenced by the statement of the trial judge during cross-examination of petitioner at the trial hereof (RD. 72a):

> "The Court: The crux of this whole question is whether or not the witness on the stand is the duly consecrated bishop of the Episcopate at Grass Lake, Michigan. *Now, you claim he is; the defendant say that he is not because they claim it was a wholly autonomous and separate body, separate church organization established in 1947 or 1948, wholly autonomous, separate and apart from the Church which consecrated this witness a bishop.* Now there is the crux of the question. What names were used certainly is of no great moment, and there isn't any use of getting into any great furor or controversy about it." (Italics ours.)

We submit that the decision below constitutes an unwarranted substitution of the facts and issue by the Circuit Court beyond the scope of its authority on review herein. The Circuit Court of Appeals, we submit, misconstrued the issue in the District Court and the significance of the evidence in relation thereto.

3. The decision below constitutes an unwarranted and a grave interference with ecclesiastical functions of church authorities.

The issue reduces itself to whether the decision has either prohibited the "free exercise" of religion, or has made a law "respecting an establishment of religion" within the meaning of the First Amendment. It is important to note what has been done in this case by judicial action. It has been held by judicial decree that petitioner, Andrei

Moldovan, may not act as a bishop or priest of the denomination and church for which he was consecrated, or be revered as such by all who will follow him. It has held that the faithful of the Romanian Orthodox Church in America may not be led in worship by and may not have as ruling hierarch one who has received his appointment and obtained apostolic succession according to the traditions, discipline, and laws of the Romanian Orthodox Church. It has held that petitioner may not have the central place of worship or possess or occupy the very site which was acquired and consecrated for and as the seat and SEE Church of the diocese, the "Vatra." The "Vatra" was purchased and substantially maintained by the Mother Church with its money for the use of its bishop. From the very beginning it has so been used. The Mother Church has, apart from its religious and canonical interest, a vested property interest in the "Vatra," and its use by it and its bishop, as his residence, central place of worship, and as the headquarters of the diocese. Extinction of that interest and denial of such use by judicial decision constitutes an unconstitutional deprivation of a vested property right. Such decree is unconstitutional and repugnant to the Fifth Amendment of the Constitution of the United States. Judicial decisions, no less than legislative and executive acts must comply with the due process provision of the Constitution. The judgment below prohibits the free exercise of his religion by the "canonical bishop" and outlaws "Patriarchal" jurisdiction from this country. For the judiciary to direct all Romanian Orthodox Churches in America to recognize and subject themselves to the jurisdiction of the respondent group which has neither canonicity or apostolic succession, is a grave intrusion into that field of conscience which is protected by the Constitution.

4. The decision below fails to give proper effect to applicable decisions of this Court as to the authority of secular courts in matters of ecclesiastical government, and is contrary to the controlling decisions of this Court as set forth in *Watson v. Jones*, 13 Wall. 679, and *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94.

It is well settled that whenever questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest and proper church tribunal, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. *Watson v. Jones*, 13 Wall. 679; *Gonzalez v. Archbishop*, 280 U. S. 1, 16-17. In failing to give due weight to the canonical act of appointment of petitioner, Andrei Moldovan, by the Patriarch and Holy Synod of the Romanian Orthodox Church, the Court below disregarded the basic foundation of those decisions. This Court, in *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, made it clear that "Freedom to select the clergy, where no improper methods of choice are proven * * * must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference"; and in view thereof, the determination of an ecclesiastical controversy is now provided with constitutional safeguards. The proposition affirmed by this Court in *Shelley v. Kraemer*, 334 U. S. 1 (1948), "that the action of state courts and judicial officers in official capacities is to be regarded as action of a state within the meaning of the Fourteenth Amendment, * * *" may properly be applied to judicial action of the Federal Courts herein as constituting governmental action forbidden by the religious protection clause of the First Amendment.

The lower court held that the decision of this Court in *Kedroff v. St. Nicholas Cathedral of the Russian Ortho-*

dox Church in North America, 344 U. S. 94, is not applicable to the instant case inasmuch as this is not a case of legislation claimed to be violative of the First Amendment to the Constitution of the United States, but a "controversy between the American and Canadian church group and the Communistic government in Romania working through the hierarchy." Thus, the decision rests, not on issues specifically litigated in the trial court, but on atmospheric considerations of general undesirability; unsubstantiated at the trial below, and clearly unsupported by the record.

In the instant case the trial court stated in its opinion (RD. 104a), and we quote:

> "The sole question for the determination of this Court, therefore, is whether or not the Romanian Orthodox Missionary Episcopate or the Romanian Orthodox Episcopate of America has achieved a degree of autonomy which is sufficient to permit it to elect its own bishop. If such autonomy rests in the episcopate here, the selection and consecration of a Bishop by the Holy Snyod cannot empower such bishop to obtain possession of the property in question, nor can he obtain relief such as is sought by the plaintiff here, to exercise the privileges and prerogatives of the bishop over this episcopate in the United States."

Stated in other words, the question is one of determining who validly selects the ruling hierarch for the Romanian Orthodox Churches in America with authority to obtain possession of the property in question. This determination of the right to use, occupy and control the property of the Episcopate in America depends upon whether the appointment of Andrei Moldovan by the Supreme Church Authority of the Romanian Orthodox Church, to wit, The Patriarch locum tenens in Bucharest and its Holy Synod, or the election of a bishop for America

by the Congress of the American parishes belonging to the Episcopate, validly selects the ruling hierarch for the American churches. The District Court, affirmed by the court below, found and concluded that in 1947, because of fear of interfering and meddling by the Romanian authorities with church affairs in the United States, the Episcopate established its autonomy as created by the adoption of new by-laws by the church congress of 1948, thereby achieving a degree of autonomy which thereafter denied the right of the Holy Synod in Romania to select and consecrate a bishop with authority over the Episcopate in America. The record, however, clearly establishes petitioner's contention throughout that the Patriarch or Holy Synod of the Romanian Orthodox Church never relinquished its authority or recognized the autonomy of the American Church, nor did they approve the respondents as officers of the Episcopate or any of their actions in connection therewith in the years 1947 and thereafter (TR. 363-364, 466, 520, 521). In the *Kedroff* case, the unlawful intrusion into the forbidden area of religious freedom was accomplished by legislative fiat. In the instant case, it was done by judicial fiat. Can it be concluded, as the court below would indicate, that, though a legislative body may not transfer the control of churches of one religious denomination from the central governing hierarchy of the church to a church organization limited to the diocese of North and South America, that the judiciary has such authority? Admittedly, the central governing hierarchy of the Romanian Orthodox Church, the Patriarch and Holy Synod, had unquestioned paramount jurisdiction over the Episcopate in America, and, admittedly nothing indicates that the Holy Synod or any succeeding Patriarch relinquished such authority or recognized the right of the American church to appoint its own bishop. The decision

below, therefore, undertook to transfer control of the American churches of the Romanian Orthodox Church from the central governing hierarchy of the Mother Church, the Patriarch and Holy Synod, to the respondents who purport to be the governing authorities of the Romanian Orthodox Missionary Episcopate of America, a church organization limited to the diocese of North and South America. The decision of the District Court, as affirmed by the court below, constitutes a reversal by a secular court of the decision of the Patriarch and Holy Synod in the appointment of Bishop Moldovan. It displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the government, through its judiciary, into the forbidden area of religious freedom contrary to the principles of the First Amendment. The decision as affirmed below directly prohibits the free exercise of an ecclesiastical right, the church's choice of its hierarchy.

The record shows no schism over faith or doctrine between the Romanian Church in America and the Romanian Orthodox Church. It shows paramount control of the American diocese (Episcopate) by the Supreme Church Authority of the Romanian Orthodox Church, including the appointment of the ruling hierarch in America from the foundation of the diocese (Episcopate) until the present day. There is nothing that indicates a relinquishment of this power by the Romanian Orthodox Church. The action below has divested the Romanian Orthodox Church of spiritual authority and of the temporal property which it symbolizes in contravention of the prohibitions of the First Amendment. The history of past attempts at secular intervention in religious conflicts makes it clear that in-

terference with religious attachments can only lead to the total subversion of the body in question. This is beyond the competence of courts in our constitutional system.

CONCLUSION.

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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STATEMENT OF QUESTIONS INVOLVED.

1. Whether the plaintiff religious body, organized as an episcopate or diocese of the Romanian Orthodox Church, a general ecclesiastical organization, validly changed its by-laws and had the power to declare its autonomy or independence in violation of its laws and charter provisions and contrary to the laws, discipline and custom of the general organization?

The lower court failed to answer this question.

The appellant contends that it should be answered "No."

2. Whether the plaintiff, Bishop Andrei Moldovan, had been elected, consecrated, and invested a bishop in conformity with the by-laws, canon laws, discipline and custom of the Romanian Orthodox Missionary Episcopate in America, and therefore the bishop of said Episcopate?

The lower court answered this question "No."

Appellant contends that it should be answered "Yes."

3. Whether the plaintiff, Bishop Andrei Moldovan, is entitled to the possession, use, control, or occupation of the real and personal property of the Romanian Orthodox Missionary Episcopate in America now in the possession and/or under the control of the defendants?

The lower court answered this question "No."

Appellant contends that it should be answered "Yes."

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